

STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 2000B079

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LESLIE JAMES EMBREY,

Complainant,

vs.

DEPARTMENT OF CORRECTIONS,
COLORADO STATE PENITENTIARY,

Respondent.

Hearing was held on February 8, 2000 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Coleman M. Connolly, Assistant Attorney General. Complainant represented himself.

Respondent's sole witness was the appointing authority, Gene Atherton, Warden, Colorado State Penitentiary in Canon City. Complainant did not testify and did not call any other witnesses on his behalf.

Respondent's Exhibits 1 through 5 were admitted into evidence without objection. Complainant's Exhibits A and B were admitted by stipulation.

MATTER APPEALED

Complainant appeals his disciplinary demotion of December 14, 1999. For the reasons set forth below, respondent's action is

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affirmed.

ISSUES

1. Whether respondent's action was arbitrary, capricious or contrary to rule or law;
2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;
3. Whether the carrying out of the discipline violated R-6-5.

FINDINGS OF FACT

1. Complainant, Leslie James Embrey, was certified in the position of Correctional Officer (C0) II at the Colorado State Penitentiary (CSP) of the Department of Corrections (DOC) when he was demoted on December 14, 1999. As a CO II, Embrey supervised other correctional officers.

2. CSP houses some of the most dangerous inmates in the correctional system. All are placed in administrative segregation, that is, daily 23-hour lockdown.

3. In September 1999, Warden and appointing authority Gene Atherton became aware of an incident of alleged sexual misconduct and possible harassment between a male correctional officer and a female correctional officer, both under Embrey's direct supervision. Atherton considered the allegation extremely serious because of the possibility of sexual harassment and because such conduct might compromise the security of the facility. He

immediately ordered an investigation by the DOC Inspector General's Office.

4. Following a review of information obtained from the investigation, Atherton concluded that a male correctional officer and a female correctional officer engaged in improper sexual conduct in the workplace. With respect to Embrey's conduct as a supervisor, the information indicated to Atherton that Embrey shared in sexually related jokes and horseplay with his subordinates and that the subject female employee probably tried to approach Embrey as her supervisor to express her concerns about sexual harassment but Embrey either did not listen to her or ignored what she had to say.

5. Atherton conducted a Rule R-6-10 meeting with Embrey in which the associate warden and the housing supervisor were also in attendance. Atherton requested the presence of the other two individuals because they had both been involved in the investigation and brought expertise with respect to fact finding.

6. The appointing authority concluded that Embrey actively participated in sexually related jokes and horseplay with staff, which violated the agency's policy against sexual harassment and created a hostile work environment in which improper sexual conduct could and did take place. In his view, based upon more than 20 years in corrections, this type of conduct compromised the safety and security of the facility. He concluded that it was probable that the female employee tried to express her concerns to her supervisor but Embrey either did not listen or ignored it. Either way, he took no action. Believing that Embrey's conduct was conspicuously, obviously and noticeably inappropriate and therefore flagrant, Atherton demoted Embrey to CO I on December 14, 1999 so Embrey would no longer supervise other employees. (Ex. 5, Ex. A.)

Atherton intended for Embrey to undergo a reduction of pay as a result of the demotion and he assumed this would happen as it did under the former grid system of structured pay grades and steps.

7. In making his decision to demote, Atherton determined that Embrey had violated DOC Administrative Regulation (AR) 1450-1, Staff Code of Conduct (Ex. 2) and AR 1450-5, the policy prohibiting workplace harassment (Ex. 3). He also took into consideration a March 1999 memo distributed to all CSP staff in which he defined and clarified the agency's "zero tolerance" policy vis-a-vis sexual harassment. (Ex. 4.)

8. A copy of the disciplinary letter (Ex. 5) was sent to the DOC personnel office in Colorado Springs. Shortly thereafter, AL Weber of that office contacted Atherton to advise him that Embrey's demotion would not automatically result in a pay reduction because the new payroll system provided an overlap of pay ranges such that it was possible for a CO I to earn more than a CO II. He informed Atherton that Embrey's pay would not be reduced without a specification of a reduction in wages.

9. On December 20, 1999, in order to implement his original intent, Atherton sent a letter to Embrey amending the December 14 disciplinary letter to include a pay reduction of \$100 per month. (Ex. B.)

10. Complainant received the December 14 disciplinary letter on December 17 and filed his appeal on December 27, 1999.

DISCUSSION

I.

Complainant does not contest engaging in horseplay with subordinates or participating in sexually related jokes. He denies having knowledge of possible sexual harassment.

Complainant presents two legal arguments. First, he contends that the appointing authority breached R-6-10 by allowing more than one representative of his choice to participate in the predisciplinary meeting. Second, complainant argues that R-6-12 was violated when he received notice of the pay reduction more than five days following the effective date of the discipline. He asserts that the pay reduction constitutes a second punishment because it was not imposed within this five-day time frame.

Respondent argues that the appointing authority, believing that complainant's conduct as a supervisor interfered with the efficient operation of the facility, made the right decision in taking away complainant's supervisory responsibilities. Respondent asserts that the appointing authority incorrectly assumed that a pay reduction would automatically come with the demotion, but the December 20 notice does not constitute a second punishment for a single incident, prohibited by R-6-5, even though it was issued more than five days from the December 14 disciplinary action. With respect to the violation of R-6-10, respondent argues that there were no consequences for complainant and, if he had voiced an objection, one of the appointing authority's representatives could have withdrawn from the meeting.

II.

R-6-10, 4 Code Colo. Reg. 801, provides in pertinent part:

When considering discipline, the appointing authority must meet with the certified employee to present information about the reason for potential discipline and give the employee an opportunity to respond. The purpose of the meeting is to exchange information before making a final decision. The appointing authority and the employee are each allowed one representative of their choice....

In the present matter, it is undisputed that the appointing authority had more than one representative at the R-6-10 meeting. However, there is no evidence that complainant objected to this circumstance, and the inference is drawn that he did not. There is no evidence that the appointing authority was unduly influenced by the attendance of two representatives or that his final decision would have been different if only one representative had attended. Without a timely objection and absent a showing of harm, the appointing authority's violation of this rule provision is insufficient to warrant overturning the disciplinary action.

R-6-5 and R-6-12, 4 Code Colo. Reg. 801, provide in pertinent part, respectively:

R-6-5. An employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature....

R-6-12. A written notice of disciplinary action must be sent by certified mail and may also be given to the employee. The employee must receive the notice no later than five days following the effective date of the discipline....

It is complainant's position that, because the pay reduction was imposed six days rather than five days after the original disciplinary action, the pay reduction is a forbidden second discipline for the same incident, the single incident being the combination of the acts which culminated in his demotion. If it is found that the amended disciplinary action is necessarily separate from the demotion, then the pay reduction, as a separate and independent action, must be stricken. The demotion, itself, is not affected.

There is sufficient evidence to conclude that the appointing authority intended for a reduction in pay to accompany complainant's demotion from CO II to CO I. There is no evidence from which to decipher a finding that the appointing authority later decided to increase the penalty imposed on December 14 or to discipline complainant again. His mistaken understanding that a pay reduction would be automatic does not result in a separate disciplinary action. Thus, complainant received notification of the disciplinary action within five days of the effective date. Since the evidence does not reveal the date of complainant's receipt of notice of the amended disciplinary action, the presumptive date of notice is the date of issuance, December 20. Complainant filed his appeal on December 27, and this appeal encompasses both the original and the amended corrective action. In actuality, the ten-day period in which to file an appeal extended from the date of the amended disciplinary action, which would have provided relief if complainant had filed his appeal up to December 30.

The question is whether the pay reduction should be effective on December 20 or December 14. This question is answered depending on whether there are one or two personnel actions. If there is

one, as found here, the effective date must be the same, that is, December 14. Complainant is not unfairly prejudiced by this result. He appealed the entire discipline, and his appeal was timely. He received due process with respect to both parts of the disciplinary action. He suffered no further consequence by being advised of the pay reduction on December 20 instead of December 14.

In order to conclude that respondent's action was arbitrary, capricious or contrary to rule or law, it must be found that, considering all the evidence in the record, a reasonable person would fairly and honestly be compelled to reach a different conclusion. If not, no abuse of agency discretion has occurred and the agency decision must be upheld. See *Ramseyer v. Colorado Department of Social Services*, 895 P.2d 1188 (Colo. App. 1995). There has not been a sufficient showing of agency abuse of discretion in this case to overturn the personnel action. It is not within the province of the Administrative Law Judge or the State Personnel Board to operate or second-guess the agency in the making of these decisions. *Hughes v. Department of Higher Education*, 934 P.2d 891, 896 (Colo. App. 1997).

This record sustains the appointing authority's action and a conclusion that respondent satisfied its burden to prove by preponderant evidence that just cause warranted the discipline imposed. See *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994).

Neither party is entitled to an award of costs and attorney fees. See R-8-38, 4 Code Colo. Reg. 801.

CONCLUSIONS OF LAW

1. Respondent's action was not arbitrary, capricious or contrary to rule or law.

2. The discipline imposed was within the range of alternatives available to the appointing authority.

3. The carrying out of the discipline did not violate R-6-5.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of
February, 2000, at
Denver, Colorado.

Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").
2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **\$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested,

recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of February, 2000, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Leslie James Embrey
3 Sage Court
Williamsburg, CO 81226

and in the interagency mail, addressed as follows:

Coleman M. Connolly
Assistant Attorney General
Personnel and Employment Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
